

76-6769

Supreme Court, U. S.  
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JUN 27 1977  
MICHAEL ROCA, JR., CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

NO. 76-6769

LEROY BATES, Petitioner

v.

STATE OF OHIO, Respondent

PETITIONER'S REPLY TO REPLY BRIEF  
OF RESPONDENT

RICHARD M. MOSK  
MARILYN EPSTEIN LEVINE  
1800 Century Park East  
Los Angeles, California 90067

JACK GREENBERG  
JAMES M. NABRIT, III  
PEGGY C. DAVIS  
JOEL BERGER  
DAVID E. KENDALL  
10 Columbus Circle, Suite 2030  
New York, New York 10019

ANTHONY G. AMSTERDAM  
Stanford University Law School  
Stanford, California 94305

ATTORNEYS FOR PETITIONER

76-6769

1           Petitioner Leroy Bates ("Bates") has set forth a correct  
2 statement of the facts (with citations to the record) and all of  
3 his legal positions in his Petition For Writ Of Certiorari.  
4 Accordingly, for the most part, no rebuttal to the Reply Brief of  
5 Respondent in Opposition to Petition for Writ of Certiorari  
6 "Respondent's Brief") is necessary.

7  
8           Petitioner does, however, desire to comment on a few  
9 points raised in the Respondent's Brief. At pages 3, 4 and 10 of  
10 Respondent's Brief, respondent in effect implies that Bates knew  
11 that his alleged accomplice's (Ellis Shelton's) gun was loaded at  
12 the time of the robbery. Respondent points to the testimony of  
13 Connie Bates who testified that Ellis Shelton (the "triggerman")  
14 said in the presence of Bates that he, Shelton, had shells for  
15 the weapon and intended an armed robbery. She stated, however,  
16 that Bates told Shelton, "If you are going to pull an armed  
17 robbery . . . don't go in the bar with a loaded gun." She said  
18 she did not hear the full conversation (TP 219, 232). Thus she  
19 confirms, in effect, Bates' testimony that he insisted that no  
20 loaded weapon be utilized. Although Bates said that Shelton had  
21 shells for the weapon (as noted by the Respondent at p. 4), his  
22 observation of the shells constituted assurance that the weapon was  
23 unloaded (TP 290). Moreover, Bates testified that just before  
24 going in the bar he again sought confirmation that the weapon was  
25 unloaded (TP 290). There is no evidence contradicting Bates'  
26 testimony that he only agreed to participate in the robbery after  
27 he was assured that the weapon carried by Shelton would not be  
28 loaded (TP 287-290, 292). It should be recalled that Bates did not  
29 carry a weapon and killed no one.

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1           Respondent states that the three mitigating factors  
2 set forth in the Ohio statute "echo" the language found in the  
3 Model Penal Code and Florida statutes (Respondent's Brief, p. 15).  
4 Both the Model Penal Code (§ 210.6(4)) and the Florida statute,  
5 referred to in Proffitt v. Florida, 428 U.S. 242, 252 (1976),  
6 however, contain significantly more mitigating factors than pro-  
7 vided by Ohio. Ohio's three limited "mitigating" factors do not  
8 comply with the requirements recently set forth in Roberts v.  
9 Louisiana, \_\_\_ U.S. \_\_\_ (June 6, 1977) in which this Court said  
10 "it is essential that the capital sentencing decision allow for  
11 consideration of whatever mitigating circumstances may be relevant  
12 to either the particular offender or the particular offense."  
13

14           With respect to the admissibility of the confession,  
15 respondent, without citation, states that every time the rights  
16 were read to Bates he said he understood them (Respondent's Brief,  
17 p. 22). The transcript of the pretrial hearing on the motion to  
18 suppress does not contain any indication that Bates stated he  
19 understood his rights. (See TM Bates 27-28, 45-48, Drescher 134,  
20 Burgess 169, 197; State v. Bates, 48 Ohio St. 2d 315, 358 N.E.2d  
21 584, 587-588 (1976)).  
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23           For the reasons set forth in the Petition For Writ Of  
24 Certiorari, petitioner urges the Court to grant the writ to  
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1 consider the issues set forth therein.

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3 Dated: June 23, 1977

4 Respectfully submitted,

5 RICHARD M. MOSK  
6 MARILYN EPSTEIN LEVINE  
7 1800 Century Park East  
8 Los Angeles, California 90067

9 JACK GREENBERG  
10 JAMES M. NABRIT, III  
11 PEGGY C. DAVIS  
12 JOEL BERGER  
13 DAVID E. KENDALL  
14 10 Columbus Circle, Suite 2030  
15 New York, New York 10019

16 ANTHONY G. AMSTERDAM  
17 Stanford University Law School  
18 Stanford, California 94305

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By Richard M. Mosk  
Richard M. Mosk  
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NO. 76-6769

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## CERTIFICATE OF SERVICE

RICHARD M. MOSK, a member of the Bar of this Court, certifies that pursuant to Rule 33 he served the within Petitioner's Reply to Reply Brief of Respondent on the counsel for respondent by enclosing a copy thereof in an envelope, airmail postage prepaid addressed to:

Simon L. Leis, Jr. Attorney General  
Leonard Kirschner State of Ohio  
Robert R. Hastings, Jr. 30 East Broad Street  
Thomas P. Longano Columbus, Ohio  
Carl W. Vollman  
Terry D. Gaines  
Office of Prosecuting  
Attorney  
420 Hamilton County Court House  
Court & Main Streets  
Cincinnati, Ohio 45202  
Attorneys for Plaintiff State of Ohio

and depositing same in the United States mails at Los Angeles, California, on June 23, 1977, and further certifies that all parties required to be served have been served.

Raymond  
Counsel for Petitioner